Khoo Kheng Sim v Khoo Chooi Leong & Anor

HIGH COURT (SHAH ALAM) — ORIGINATING SUMMONS NO 24–217 OF 1995
LOW HOP BING J
30 AUGUST 2001

Civil Procedure *— Mode of commencement of proceedings — 'Penipuan' — Allegation of fraud or deceit in application of small estate distribution order — Whether should be by way of writ or originating summons — Particulars of fraud insufficiently pleaded, effect of — Rules of the High Court 1980 O 5 r 2(a), (b) & O 28 r 8(1)*

The plaintiff applied, by way of amended originating summons, for, inter alia, orders that both the defendants were trustees of the estate of Khoo Koon Siong ('the deceased'); that the plaintiff was a child entitled to a $^1/_3$ share of the deceased's estate, and that both the defendants were the trustees of the plaintiff's portion in the deceased's estate of 11 lots of land, which the plaintiff alleged that both the defendants had become the registered owners of $^1/_2$ share each of the aforesaid 11 lots of land. The plaintiff's affidavit dated 3 September 1999, in para 7 encl 7, raised the issue of 'penipuan', (ie fraud or deceit) in the first defendant's application under the Small Estates Distribution Ordinance 1955. Counsel for the first defendant raised a preliminary objection that the mode of commencing these proceedings by way of originating summons was wrong as the plaintiff should have commenced a writ action.

Held:

(1) If the plaintiff intended the word 'penipuan' to mean deceit, then it was a claim made by the plaintiff for relief or remedy for a tort (see p 348H); *Derry v Peek* [1889] 12 AC 337; *Blue Nile Co Ltd v Emery Customs Brokers (S) Pte Ltd* [1990] 2 MLJ 385 and *Marina Sports Ltd v Alliance Richfield Pte Ltd* [1990] 3 MLJ 5 followed. It is trite law that deceit is an example of a cause of action in tort, in which case, O 5 r 2(a) of the Rules of the High Court 1980 ('the RHC') would apply. On the other hand, if 'penipuan' was used to mean 'fraud', then O 5 r 2(b) of the RHC would apply so that the mode of commencement would still be by way of writ (see p 348H–I).

(2) In the case before the court, the plaintiff's allegation of fraud was based merely on a single sentence in the most general term which did not specifically plead the particulars of fraud. This mere allegation was certainly falling short of the standard of pleading which was so well established in any matter raising an allegation of fraud (see p 349C–D).

(3) The particulars of fraud should be specifically pleaded and the matter herein should have been commenced by way of a writ as opposed to an originating summons (see p 350A). Besides the

allegation of fraud, there were numerous disputes of facts which would certainly call for the application of O 28 r 8(1) of the RHC for the purpose of enabling the court to order the proceedings herein to continue as if the cause or matter had been so begun by way of a writ. The proceedings herein therefore shall continue as if this cause or matter had been begun by way of a writ and the parties were ordered to deliver their pleadings in accordance with O 18 of the RHC (see p 350A–B); *Ting Ling Kiew & Anor v Tang Eng Iron Works Co Ltd* [1992] 2 MLJ 217 followed.

[Bahasa Malaysia summary

Plaintif memohon, melalui suatu saman pemula yang telah dipinda, untuk, antara lain, perintah bahawa kedua-dua defendan ('defendan-defendan') adalah pemegang-pemegang amanah bagi harta pusaka Khoo Koon Siong ('simati'); bahawa plaintif adalah anak yang mempunyai hak ke atas $^1/_3$ syer daripada harta pusaka simati, dan bahawa defendan-defendan merupakan pemegang-pemegang amanah bagi bahagian plaintif dalam harta pusaka simati yang terdiri daripada 11 lot tanah tersebut. Plaintif mengatakan bahawa defendan-defendan telah menjadi pemilik berdaftar $^1/_2$ syer masing-masing bagi 11 lot tanah tersebut. Afidavit plaintif bertarikh 3 September 1999, dalam perenggan 7 lampiran 7, membangkitkan isu 'penipuan' dalam permohonan defendan pertama di bawah Ordinan Pembahagian Estet Kecil 1955. Peguam defendan pertama membangkitkan bantahan awal atas hujahan bahawa cara prosiding-prosiding ini dimulakan iaitu secara saman pemula adalah salah kerana plaintif sepatutnya memulakan satu tindakan writ.

Diputuskan:

(1) Sekiranya plaintif berniatkan agar perkataan 'penipuan' membawa maksud perdayaan, ia merupakan tuntutan oleh plaintif bagi relif atau remedi bagi satu tort (lihat ms 348H); *Derry v Peek* (1889) 12 AC 337; *Blue Nile Co Ltd v Emery Customs Brokers (S) Pte Ltd* [1990] 2 MLJ 385 dan *Marina Sports Ltd v Alliance Richfield Pte Ltd* [1990] 3 MLJ 5 diikut. Ia jelas bahawa perdayaan adalah satu contoh kausa tindakan dalam tort, dan oleh itu, A 5 k 2(a) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') akan terpakai. Sebaliknya, jika 'penipuan' membawa maksud 'frod', A 5 k 2(b) KMT akan terpakai dan cara memulakan prosiding masih secara writ (lihat ms 348H–I).

(2) Dakwaan frod plaintif hanyalah berdasarkan satu ayat dalam terma yang umum yang tidak secara spesifik memplidkan butir-butiran frod. Dakwaan semata-mata ini memanglah tidak mencapai piawai pliding yang begitu mantap dalam apa-apa perkara yang membangkitkan dakwaan frod (lihat ms 349C–D).

A (3) Butir-butiran frod seharusnya diplid secara spesifik dan perkara tersebut sepatutnya dimulakan secara writ dan bukannya saman pemula (lihat ms 350A). Selain daripada dakwaan frod, terdapat beberapa pertikaian fakta yang mewajibkan pemakaian A 28 k 8(1) KMT bagi tujuan membolehkan mahkamah memberi perintah prosiding tersebut diteruskan seolah-olah kausa atau B perkara tersebut telah dimulakan secara writ. Oleh itu, prosiding tersebut akan diteruskan seolah-olah kausa atau perkara ini telah dimulakan secara writ dan pihak-pihak diperintahkan menyampaikan pliding masing-masing menurut A 18 KMT (lihat ms 350A–B); *Ting Ling Kiew & Anor v Tang Eng Iron Works Co* C *Ltd* [1992] 2 MLJ 217 diikut.]

Notes

For a case on mode of commencement of proceedings, see 2(2) *Mallal's Digest* (4th Ed, 2001 Reissue) para 4045.

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Cases referred to

Blue Nile Co Ltd v Emery Customs Brokers (S) Pte Ltd [1990] 2 MLJ 385 (folld)

Cheong Kim Hock v Lin Securities (Pte) (in liquidation) [1992] 2 SLR E 349 (refd)

Deadman, Smith v Garland & Ors, Re [1971] 2 All ER 101 (refd)

Derry v Peek (1889) 12 AC 337 (folld)

Marina Sports Ltd v Alliance Richfield Pte Ltd [1990] 3 MLJ 5 (folld)

Seah Choon Chye v Saraswathy Devi [1971] 1 MLJ 112 (refd)

F *Ting Ling Kiew & Anor v Tang Eng Iron Works Co Ltd* [1992] 2 MLJ 217 (folld)

Wallingford v Mutual Society (1880) 5 AC 685 (refd)

Legislation referred to

G Companies Act 1965 s 304(1)

Rules of the High Court 1980 O 5 r 2(a), (b), O 18, O 28 r 8(1), O 88 r 2

Small Estates Distribution Ordinance 1955

Vickneswary Manickam (*V Manickam & Partners*) for the applicant.

H *JS Lim* (*Chellam Wong*) for the first defendant.

Low Hop Bing J: This is the plaintiff's application by way of amended originating summons in encl (18) asking for the following orders:

(1) That both the defendants are the trustees of the estate of Khoo Koon I Siong, deceased;

(2) That the plaintiff is a child entitled to $^1/_3$ share of the estate of Khoo Koon Siong, the deceased:

(3) That both the defendants are the trustees of the plaintiff's portion in the estate of the said deceased consisting of some 11 lots of land, all in the district of Raub, which the plaintiff alleges both the defendants have become the registered owners of $^1/_2$ share each of the aforesaid 11 lots of land.

At the outset, it must be immediately emphasized that learned counsel for both the plaintiff and the defendants have submitted at great length on issues raised by the parties in their respective affidavits. Although I take cognizance of the fact that they have expended enormous efforts in filing their written submissions, I find it necessary to refer to one pertinent point only ie the issue of 'penipuan' (ie fraud or deceit) deposed to by the plaintiff on 3 September 1998 in para 7 encl (27) which is the plaintiff's affidavit, in the following words:

> Oleh sedemikian saya menegaskan saya berhak mengambil tindakan ini kerana adanya isu penipuan dalam permohonan defendan pertama di bawah Ordinan Pembahagian Estet Kecil 1955.

[Translation: Therefore I stress that I am entitled to take this action because of the existence of fraud (or deceit) in the first defendant's application under the Small Estates Distribution Ordinance 1955].

On the issue, Mr JS Lira, learned counsel for the first defendant, raised a preliminary objection that the mode of commencing these proceedings by way of originating summons is wrong, as the plaintiff should have commenced a writ action. Ms Vickneswary Manickam, learned counsel for the plaintiff, seemed to be quite contented with her mode of commencement of proceedings. After giving due consideration to the aforesaid submissions, I hold that there are merits in the preliminary objection raised for the first defendant. O 5 r 2(a) or (b) of the Rules of the High Court 1980 ('the RHC'), which was relied upon by the first defendant, reads as follows:

> Proceedings which must be begun by writ
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> Subject to any provision of any written law and of these rules, by virtue of which any proceedings are expressly required to be begun otherwise than by writ, the following proceedings must, notwithstanding anything in r 4, be begun by writ, that is to say, proceedings —
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> (a) in which a claim is made by the plaintiff for any relief or remedy for any tort, other than trespass to land;
>
> (b) in which a claim made by the plaintiff is based on an allegation of fraud;
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> ...

If the plaintiff intends the word 'penipuan' to mean deceit, then it is a claim made by the plaintiff for relief or remedy for a tort (see *Derry v Peek* (1889) 12 AC 337; *Blue Nile Co Ltd v Emery Customs Brokers (S) Pte Ltd* [1990] 2 MLJ 385; *Marina Sports Ltd v Alliance Richfield Pte Ltd* [1990] 3 MLJ 5). It is trite law that deceit is an example of a cause of action in tort, in which case, O 5 r 2(a) of the RHC would apply. On the other hand, if 'penipuan' is used to mean 'fraud', then O 5 r 2(b) of the RHC would apply so that the mode of commencement would still be by way of writ. The rationale for

such rules as incorporated in O 5 r 2(a) and (b) of the RHC is that parole evidence is usually required: *Seah Choon Chye v Saraswathy Devi* [1971] 1 MLJ 112; *Cheong Kim Hock v Lin Securities (Pte) (in liquidation)* [1992] 2 SLR 349. Where, for example, as in the instant case, the action is commenced by originating summons, it may be continued as if begun by writ: O 28 r 8(1) of the RHC; *Re Deadman, Smith v Garland & Ors* [1971] 2 All ER 101, approved in *Ting Ling Kiew & Anor v Tang Eng Iron Works Co Ltd* [1992] 2 MLJ 217. In *Ting Ling Kiew & Anor*, supra the respondents took out an originating summons under O 88 r 2 of the RHC in an application under s 304(1) of the Companies Act 1965 seeking, inter alia, declarations that the business of a company, Har Lee Enterprise Sdn Bhd had been carried on with intent to defraud creditors. When the appeal came before the Supreme court, it was held, inter alia, that in a case where fraud or intention to defraud was the central issue, particulars of fraud must be specifically pleaded.

Further, in the case before me, the plaintiff's allegation of fraud is based merely on a single sentence in the most general term which does not specifically plead the particulars of fraud. This mere allegation is certainly falling short of the standard of pleading which is so well established in any matter raising an allegation of fraud. Hence, the Supreme Court in *Ting Ling Kiew & Anor*, followed and adopted *Wallingford v Mutual Society* (1880) 5 AC 685; especially the speeches of Lord Selborne LC, Lord Hatherley and Lord Watson, as follows.

Lord Selborne said at p 697:

> With regard to fraud, if there be any principle which is perfectly well settled, it is that general allegations, however strong may be the words in which they are stated, are insufficient even to amount to an averment of fraud of which any court ought to take notice. And here I find nothing but perfectly general and vague allegations of fraud. No single material fact is condescended upon, in a manner which would enable any court to understand what it was that was alleged to be fraudulent ...

At p 701, Lord Hatherley said:

> There is the question of fraud upon which I said I should touch in one moment. Now I take it to be as settled as anything well can be by repeated decisions, that the mere averment of fraud, in general terms, is not sufficient for any practical purpose in the defence of a suit. Fraud may be alleged in the largest and most sweeping terms imaginable. Nobody can be expected to meet a case, and still less to dispose of a case, summarily upon mere allegations of fraud without any definite character being given to those charges by stating the facts upon which they rest.

Lord Watson is more specific and at p 709 he said:

> My Lords, it is a well known, and a very proper rule that a general allegation of fraud is not sufficient to infer liability on the part of those who are said to have committed it.

I therefore follow and apply the aforesaid speeches and also the judgment of the Supreme Court delivered by Jemuri Serjan CJ (Borneo) in *Ting Ling*

Kiew & Anor, and hold that the particulars of fraud should be specifically pleaded and that the matter herein should have been commenced by way of a writ as opposed to an originating summons. A

Besides the allegation of fraud, there are numerous disputes of facts which would certainly call for the application of O 28 r 8(1) of the RHC for the purpose of enabling the court to order the proceedings herein to continue as if the cause or matter had been so begun by way of a writ. I therefore hold that the proceedings herein shall continue as if this cause or matter had been begun by way of a writ and further order that the parties do deliver their pleadings in accordance with O 18 of the RHC as has been done by the Supreme Court in *Ting Ling Kiew & Anor*. B

In the instant case, I order costs in the cause. C

Order accordingly.

Reported by Wong Ee Lynn

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